



March 27, 2014

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Submitted electronically and by US Mail to the email addresses listed above.

Re: Freedom of Information Act (FOIA) Request of Trout Unlimited.

Dear Ms. Kercheval and Mr. Gottesman:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, and implementing regulations of the U.S. Environmental Protection Agency ("EPA"), 40 C.F.R. Part 2, Trout Unlimited hereby requests access to and copies of the following records:

1. All records and documents EPA has released or will release in conjunction with past and on-going FOIA requests referring to the proposed Pebble Mine project in Bristol Bay, Alaska and/or EPA's assessment entitled *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* ("Watershed Assessment") as requested by the Pebble Limited Partnership, Northern Dynasty Minerals Ltd., and/or the State of Alaska – either individually or through their respective attorneys. Such records include, but are not limited to, all documents released pursuant to the following FOIA requests:
 - FOIA Request by Peter D. Robertson, The Pebble Partnership
Tracking Number: EPA-R10-2014-002963 (submitted January 27, 2014);
 - FOIA Request by Mike Heatwole, The Pebble Partnership
Legacy Tracking Number: 10-FOI-00174-11 (submitted February 18, 2011);
 - FOIA Request by Richard E. Schwartz, Crowell & Moring LLP
Tracking Number: EPA-R10-2013-003997 (submitted February 26, 2013);

- FOIA Request by Richard Schwartz, Crowell & Moring LLP
Tracking Number: EPA-R10-2012-000911 (submitted August 29, 2012);
 - FOIA Request by David Ross, Crowell & Moring, LLP
Tracking Number: EPA-HQ-2012-001026; Legacy Tracking Number: HQ-FOI-00944-12 (submitted March 13, 2012);
 - FOIA Request by David Ross, Crowell & Moring LLP
Tracking Number: EPA-R10-2012-000874; Legacy Tracking Number: 10-FOI-00164-12 (submitted March 5, 2012);
 - FOIA Request by Ruth Heese, State of Alaska Department of Law
Tracking Number EPA-HQ-2012-003390 (submitted December 3, 2012);
 - FOIA Request by Ruth Heese, State of Alaska Department of Law
Tracking Number: EPA-HQ-2012-001107; Legacy Tracking Number: HQ-FOI-01421-12 (submitted June 1, 2012);
 - FOIA Request by Ruth Heese, State of Alaska Department of Law
Tracking Number: EPA-R10-2012-001644; Legacy Tracking Number: 10-FOI-00264-12 (submitted May 31, 2012).
2. Records of all meetings and/or communications with any non-USEPA participants related to the Watershed Assessment and/or to the petitions filed with EPA seeking 404(c) action in Bristol Bay, including but not limited to all documents associated with communications, meetings, phone calls, and emails that any EPA offices may have had with Northern Dynasty Minerals Ltd, Pebble Limited Partnership, Pebble Mines Corp., Anglo American PLC, Hunter Dickinson Inc., Rio Tinto, officials of the State of Alaska, Alaska Miners Association, and Resource Development Council and their respective agents.
 3. Records and associated documents pertaining to requests for an investigation into the Watershed Assessment and the petitions filed with EPA seeking 404(c) action in Bristol Bay, including requests from Congress and investigation requests made to the EPA Office of Inspector General.

For purposes of this request, the term “records” means information of any kind, however produced or reproduced, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, working papers, reports, books, reviews, guidance documents, policies, reports of telephone conversations, meeting calendars, interoffice memoranda, telefaxes, e-mails, documents, databases, drawings, graphs, charts, photographs, telegrams, invoices, minutes or records of any sorts of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

Without limitation, the records requested above include documents relating to the Watershed Assessment at *any stage of development*, whether proposed, draft, pending, final, or otherwise. In responding to this request, please include relevant records that are in the possession or otherwise under the control of any unit or office of the EPA, including local, regional, and national offices. *See* 5 U.S.C. § 552(f)(2); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (holding that FOIA applies to records created or obtained by the agency and in its “control” at the time of the request).

Exempt Records

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information to appeal the denial. *See* 5 U.S.C. §§ 552(a)(6)(A)(i), (a)(6)(F). To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions, identify and describe the withheld portions, specify the applicable exemption, and provide the remainder of the record. *See* 5 U.S.C. §§ 552(a)(6)(A)(i), (a)(6)(F), (b).

I encourage you to release any records, or portions thereof, that may technically be shielded by exemptions if there is no purpose served by withholding the requested records. *Chrysler Corp. v. Brown*, 441 US 281, 294-95 (1979) (holding that FOIA exemptions are discretionary).

Fee Waiver Request

Trout Unlimited requests a waiver of fees associated with this request. Under FOIA,

[d]ocuments shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.¹

¹ 5 U.S.C. § 552(a)(4)(iii); see also 15 C.F.R. § 4.11(k).

If for some reason, the fee waiver request is denied, while reserving all rights to appeal such a decision, we are willing to pay a reasonable fee not to exceed \$500 to cover the cost of duplication and delivery of the requested materials. If you estimate the costs of responding to this request will exceed \$500, please contact Tim Bristol or Kate Miller (contact information provided at the end of this letter). In the event that your agency denies a fee waiver, please send a written explanation for the denial.

Trout Unlimited respectfully requests that, as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), EPA waive all fees in connection with this request, including a waiver of all processing and copying fees described in 5 U.S.C. § 552(a)(4)(A). As explained below, Trout Unlimited's FOIA request satisfies the six factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the broad requirement for fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l).

Trout Unlimited is a national nonprofit organization with more than 150,000 members organized into about 400 chapters across the U.S. - from Maine to California to Alaska. These dedicated grassroots volunteers are matched by a respected staff of lawyers, policy experts and scientists, who work out of more than 30 offices nationwide. These conservation professionals ensure that Trout Unlimited is at the forefront of fisheries restoration work at the local, state and national levels to fulfill our mission to conserve, protect, and restore North American's coldwater fisheries and their watersheds. Trout Unlimited has been involved in the public process for the proposed Pebble Project for the past five years – publishing reports, participating in public hearings, evaluating data, and helping to better inform the public on the process and substantive issues related to the proposed Pebble Project – particularly as related to coldwater fishery concerns. Trout Unlimited has no commercial interest in obtaining the requested information; instead we intend to use the requested information to inform the public, so that the public can meaningfully participate in the EPA's 404(c) process moving forward.

Disclosure of the requested information is in the public interest—as it will: (1) contribute significantly to the public's understanding of EPA's operations and activities, and (2) is not in the commercial interest of Trout Unlimited.

1. The requested documents will significantly contribute to the public understanding of the operations and activities of EPA as they relate to the Watershed Assessment.

To determine whether this first requirement is met, EPA considers the following factors: (1) whether the subject of the request concerns identifiable operations or activities of the Federal government; (2) whether the disclosure is “likely to contribute” to an understanding of government activities or operations, i.e., whether the disclosed information is “meaningfully informative about government operations or activities”; (3) whether disclosure of the requested information will contribute to “public understanding”

of a “reasonably broad audience of persons interested in the subject”; and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities “as compared to the level of public understanding existing prior to the disclosure.” 40 C.F.R. § 2.107(l)(2)(i)-(iv).

First, the subject matter of the requested records directly concerns “the operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i). There is a “direct and clear” connection between the subject of this request and activities of the government. *Id.* The requested records concern “identifiable operations” of the government, such as: EPA’s scientific development of the Watershed Assessment over a four year period, EPA’s management of the peer review process, EPA’s treatment and incorporation of public and technical concerns into the final Watershed Assessment document, and EPA meetings with the public, scientists, and government officials and Tribes. Disclosure of these records will shed light on EPA’s process and activities involved in the creation of the Watershed Assessment.

Second, the requested records contain information that is “likely to contribute” to an understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(ii). The requested records are indeed “meaningfully informative about government operations or activities.” *Id.* These records contain substantial information about EPA’s four year-long scientific and public process leading to the creation of the final Watershed Assessment. Many of these documents are not publicly available and may only be obtained via a FOIA request. Furthermore, the disclosure of the requested information cannot be considered “already ... in the public domain, in either a duplicative or substantially identical form [as to] not be likely to contribute to such understanding when nothing new would be added to the public’s understanding.” 40 C.F.R. § 2.107(l)(2)(ii). Although some of the requested records have been sought and obtained by other parties via FOIA, the complete results of those FOIA requests have not been distributed to the public. The public’s understanding of EPA’s operations and activities during development of the Watershed Assessment will be greatly enhanced through release of this information to Trout Unlimited, as Trout Unlimited intends to use this information to contribute to the public’s understanding.

Third, disclosure of the requested records will contribute to “public understanding” of a “reasonably broad audience of persons interested in the subject.” 40 C.F.R. § 2.107(l)(2)(iii). Trout Unlimited has a longstanding interest and experience of informing public understanding throughout EPA’s development of the Watershed Assessment. With the requested information, Trout Unlimited seeks to further its role to inform the public about EPA’s operations and activities as they relate to the Watershed Assessment. It is especially important, in light of the highly-publicized nature of EPA’s operations and activities here, that disclosure of the requested information be presented to a “broad audience of persons interested in the subject.” *Id.* Additionally, Trout Unlimited unquestionably has the “expertise in the subject area” and “ability and intention to effectively convey information to the public.” *Id.* With the requested records, Trout Unlimited intends to provide the requested information to the public as well as appropriate members of State and Federal Government and their relevant committees.

Information will be disseminated to these individuals and entities, as appropriate, through one or more of the following methods:

- Release of information to the news media;
- Posting information on the Trout Unlimited web page (www.tu.org), which draws approximately 17,000 unique visitors each month; and
- Circulation of information through email and other outreach to our state-based, regional and national membership as well as to relevant partner organizations and other interested parties.

Fourth, disclosure of the requested records will likely to contribute “significantly” to public understanding of government operations or activities “as compared to the level of public understanding existing prior to the disclosure.” 40 C.F.R. § 2.107(l)(2)(iv). During the nearly four years EPA has taken to develop the Watershed Assessment, EPA’s operations and activities have been discussed extensively in local and national media, and notably some discussions have been tailored to misinform and reduce confidence in EPA’s activities. Dissemination of misleading and incomplete information obtained via other parties’ FOIA requests has led to decreased public understanding of the Watershed Assessment and EPA’s scientific and public processes. Thereby, disclosure of the requested records to Trout Unlimited and Trout Unlimited’s dissemination of this information in a comprehensive manner will “significantly” increase the public’s present understanding, clarify any on-going misconceptions, and reduce public confusion regarding EPA’s activities and operations.

2. Trout Unlimited has no commercial interest in the disclosure of the information.

To determine whether this second requirement is met, the following factors are considered: (1) whether the requester has a commercial interest that would be furthered by the requested disclosure; and (2) whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that would make the disclosure “primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(3)(i)-(ii).

First, Trout Unlimited has no commercial interests that would be furthered by this FOIA request and Trout Unlimited’s primary interest in this FOIA request is in no way commercial. Trout Unlimited is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code, and as such has no commercial interest. Second, as discussed above, it is clear that the disclosure of the requested information is in the public interest. The requested information will contribute significantly to the public’s understanding of the proposed Pebble Project, EPA’s Watershed Assessment, and EPA’s activities and operations. Trout Unlimited will use the requested information to increase public understanding of the operations and activities of EPA as they relate to the proposed Pebble Project.

Record Delivery

I request that EPA, in responding to this request, comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations and look forward to receiving your response within 20 working days. 5 U.S.C. § 552, (a)(6)(A)(i); 40 C.F.R. § 2.104. Please produce records on a rolling basis; at no point should the search for -- or deliberation concerning -- certain records delay the production of others that the agency has already retrieved and elected to produce.

We prefer to receive electronic copies, and not paper copies, wherever possible. To the extent practicable, we request that the EPA provide the requested information on CD-ROM in searchable, electronic format. Please mail copies of all requested records to:

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Thank you for your attention to this request.

Sincerely,



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Alaska Director

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